Supreme Court, U.S.
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No. 00-1129

In The

# Supreme Court of the United States

DAVID ODDI; ERIN ODDI, His Wife,

*Petitioners,*

v.

FORD MOTOR COMPANY, et al.

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN H. WILLIAMS, JR., ESQUIRE
DONALD J. MCCORMICK, ESQUIRE
*Counsel of Record*
GORR, MOSER, DELL & LOUGHNEY
437 Grant Street
1300 Frick Building
Pittsburgh, PA 15219
(412) 471-1180

Attorneys for Respondents
Grumman Allied Industries, Inc.;
Grumman Olson Bodies, Inc.;
Olson Bodies, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED FOR REVIEW

Petitioner Oddi contends that the vehicle in which he was injured was not crashworthy. It is well-established in Pennsylvania law that a plaintiff in a crashworthiness case must establish four elements:

(1) the design of the product was defective;

(2) when the design was made, an alternative, safer design, practicable under the circumstances, existed;

(3) what injuries, if any, the plaintiff would have received had the alternative, safer design, been used; and

(4) what injuries were attributable to the defective design.

The District Court concluded, under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), that Plaintiff's expert lacked a sufficiently reliable basis for his conclusion that the vehicle was defectively designed. The District Court further concluded that Plaintiff's expert failed to present any evidence whatsoever of an alternative, feasible design.

The issues Petitioner truly presents to this Honorable Court are fairly set forth as follows:

**QUESTION PRESENTED FOR REVIEW** – Continued

Whether the District Court abused its discretion when it concluded that Plaintiff's expert lacked anything but a hunch that the vehicle could have been made safer; and

Whether the Third Circuit Court erred in refusing to shift to the Defendants the burden of proof with respect to whether the vehicle is crashworthy as established by Pennsylvania law.

## PARTIES TO THE PROCEEDING

### Petitioner

David Oddi is a private individual and has no corporate affiliations.

### Respondents

Ford Motor Company, Grumman Allied Industries, Inc., Grumman Olson Bodies, Inc., and Olsen Bodies, Inc.

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## REASONS TO DENY THE PETITION

### I. Statement of the Case

#### A. Nature of the Case

This is a crashworthiness/products liability action arising out of a vehicle accident that occurred on June 21, 1993. Petitioner David Oddi claims that he suffered certain injuries as a result of alleged deficiencies in the design and/or manufacture of the vehicle. Oddi does not assert that the alleged deficiencies *caused* the accident; rather, Oddi asserts that the alleged deficiencies allowed him to suffer injuries that a non-defectively designed vehicle would not have allowed. Oddi claims that Defendants Ford Motor Company and Grumman[1] were each responsible for the design and manufacture of certain portions of the vehicle.

Oddi contends, for a variety of reasons, that the truck was not crashworthy. First, Oddi contends that the design of the truck's bumper allowed the underside of the truck to ride up onto a guardrail and slide into a bridge abutment. Defendants dispute that the truck rode up onto the guardrail at all, and contend that, instead, the truck struck the guardrail and rolled over it.

Oddi further contends that, having rode up on the guardrail, deficiencies in the strength of the flooring allowed the flooring to become bent upon impact with a bridge abutment and apply forces to Oddi's legs, which

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[1] The Grumman defendants include Grumman Allied Industries, Inc., Grumman Olson Bodies, Inc., and Olson Bodies, Inc. They are referred to collectively herein as "Grumman."

he contends was the cause of his leg injuries. Defendants dispute that the flooring was deficient, and also dispute whether the bending of the floorboards caused any injury whatsoever to Oddi's legs.

### B. Course of Proceedings and Disposition In Lower Courts

After deposing Oddi's experts, each of the Defendants moved for summary judgment. Grumman brought a challenge to Oddi's case under Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986),[2] contending that, under Pennsylvania law, Oddi has certain interrelated burdens of proof in a crashworthiness case which Oddi cannot meet. Specifically, in Barker v. Deere,

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[2] The moving party generally has the burden of identifying evidence which it believes shows an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Childers v. Joseph, 842 F.2d 689, 694 (3rd Cir. 1988). However, the moving party's burden may be discharged by *demonstrating that there is an absence of evidence to support the non-moving party's case.* Celotex, 477 U.S. at 325. Once the moving party satisfies its burden, the burden shifts to the non-moving party, who must go beyond its pleading and designate specific facts by use of affidavits, depositions, admissions, or answers to interrogatories showing there is a genuine issue for trial. Id. at 324. Moreover, when the non-moving party bears the burden of proof, it must "make a showing sufficient to establish the existence of [every] element essential to that party's case." Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812 F.2d 141, 144 (3rd Cir. 1987) (*quoting* Celotex, 477 U.S. at 322). *See also,* Barnes v. American Tobacco Co., Inc., 985 F.Supp. 842 (E.D.Pa. 1997).

60 F.3d 158 (3rd Cir. 1995), the Court set forth the elements that must be shown to succeed on a theory of crashworthiness:

> [T]o establish a cause of action based on a theory of crashworthiness, the claim asserted here, a plaintiff must show:
>
> (1) the design of the product was defective;
>
> (2) when the design was made, an alternative, safer design, practicable under the circumstances existed;
>
> (3) what injuries, if any, the plaintiff would have received had the alternative, safer design, been used; and
>
> (4) what injuries were attributable to the defective design.

Barker, 60 F.3d at 151-52, n. 3. *See also* Kupetz v. Deere & Co., Inc., 435 Pa.Super. 16, 644 A.2d 1213 (1994), *appeal denied*, 593 Pa. 693, 653 A.2d 1232 (1994).

Having no way of being certain what evidence Oddi would contend satisfied these elements of proof, or what affidavits Oddi might provide in opposition to the motion, Grumman refrained at that point from expressly making a challenge under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), to any of the evidence presented to that point in the case. Rather, Grumman observed that nothing produced by Oddi to that point was admissible or carried his burden of proof. Grumman relied upon substantial admissions in Oddi's expert's depositions which established that Oddi would not be able to use *that* evidence to carry his burden.

Ford also moved for summary judgment. Ford contended that the evidence of lack of crashworthiness produced by Oddi to date would not satisfy the standards for scientific evidence established by Daubert, in that this Court has required that experts set forth the bases for and reliability of their conclusions.

In response to Grumman's and Ford's Motions for Summary Judgment, Oddi filed a Brief replete with photographs and expert reports and deposition testimony and affidavits that failed to address or failed to satisfy the points raised in the Motions for Summary Judgment.

After reviewing the materials upon which Oddi chose to rely to oppose the Motions for Summary Judgment, Grumman filed a reply brief that observed: (1) that the testimony, affidavits and reports cited by Oddi *still* did not satisfy his burden of showing that the truck was not crashworthy, either by establishing an alternative, feasible design or by showing what injuries he would have sustained had the truck utilized another design, and (2) that Oddi's information was *not* admissible for the reasons set forth in Ford's motion and brief, *i.e.*, the Daubert decision requires that experts articulate acceptable bases for their opinions.

The United States District Court for the Western District of Pennsylvania granted the Motions for Summary Judgment, concluding that the information set forth by Oddi in opposition to the pending motions failed to satisfy the standards set forth in Daubert or a plaintiff's burden in a crashworthiness case under Pennsylvania law. The Court issued an Opinion and Order in which the Court concluded that Oddi's experts' reports, depositions

and affidavits did not so much as approach a demonstration that his experts' conclusions and opinions had any reliability or basis whatsoever. Various motions to reconsider were denied.

The United States Court of Appeals for the Third Circuit affirmed, concluding as did the District Court that Oddi's experts did not satisfy Daubert and did not satisfy the elements of a crashworthiness case under Pennsylvania law.

The instant Petition followed.

## II. Argument

### A. The Petition Fails To Satisfy Or Even Address The Criteria For Granting A Writ Of Certiorari

#### 1. The Petition Fails To Suggest That The Issue Presented Has General Importance Or That A Conflict Exists

Rule 10 of the Supreme Court Rules sets forth criteria which indicate the character of the reasons to be considered by the Court for granting a petition for a writ of certiorari. Said reasons include, but are not necessarily limited to:

> cases involving a conflict between the decision from which an appeal is sought and other appellate decisions on the same important matter;
>
> cases involving a decision which "so far departed from the accepted and usual course of judicial proceedings," or sactioned such a decision by the lower court;

> cases involving a decision by a state court of last resort on an imporant federal question that conflicts with a decision of another state court of last resort or a court of appeals;
>
> cases involving a decision on important issues of federal law that have not been but should be settled by this Honorable Court.

*See* Rule 10. Petitioner Oddi does not even attempt to establish in his Petition how the instant matter might possess such significance as could warrant the attention of this Court. He does not invite this Court's attention to a single decision that has reached a conclusion contrary to the conclusions reached below. Nor has petitioner endeavored to explain what far-reaching effect the decision of the Third Circuit Court of Appeals might have on future litigants, or how a reversal of that decision might right a great injustice.

It is respectfully suggested that Petitioner Oddi does not venture this undertaking, in part, because the issue he would bring to this Court lacks such import. It is further suggested that Petitioner Oddi avoids this discussion, in part, because the relief he seeks depends upon this Court's willingness to re-write Pennsylvania law on the elements of a cause of action for a crashworthiness claim, or, at least, a willingness by this Court to alter Pennsylvania law with respect to the burden of proof on the elements of such a cause of action.

The character of the issue, then, is not such as would warrant review by this Court under the standards articulated in Rule 10.

### 2. Certiorari Is Inappropriate Where The Petition Merely Contends That The Proper Standard Was Misapplied

Rule 10 instructs that a petition for a writ "is rarely granted" when the asserted error consists of a misapplication of a properly stated rule of law. In this case, Petitioner mounts no challenge to the law stated or applied by the Third Circuit Court or the District Court; rather, Petitioner complains of the *manner* in which the law was applied. In fact, Petitioner expressly contends:

> The Third Circuit, in affirming the district court, misapplied Daubert by applying a rigid standard to Mr. Noettl's expert testimony rather than applying a flexible standard.

Petition at 6. That is, Petitioner contends that the Third Circuit Court, as well as the District Court, *misapplied* the law. Rule 10 expressly indicates that this is not the character of decision which warrants review by this Honorable Court.

### 3. Petitioner Attempts To Challenge – And To Avoid His Burden Of Proof Under – State Law

Finally, for the reasons set forth in greater detail herein, Petitioner's true issue is *not* one of federal law, but rather, one of state law, to wit, whether the Third Circuit Court erred in refusing to shift to the defendants the burden of proof with respect to whether the vehicle is crashworthy. It is clear under Pennsylvania law that the burden of proof with respect to a safer alternative design

rests with the Plaintiff (element 2). Kupetz v. Deere & Co., Inc., 435 Pa.Super. at ___, 644 A.2d at 1218. It is equally clear that Plaintiff seeks to shift that burden to the Defendants in contravention of Pennsylvania law. With due respect to the Court, the burden of proof required to establish a state law cause of action is not a matter on which this Honorable Court is even empowered to issue an authoritative decision. *See* Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941).

In summary, Petitioner has failed to set forth a basis that would warrant the grant of a writ of certiorari to review the merits of the matters involved.

**B. The Issue For Which Petitioner Seeks Review Was Not Decided By Either Lower Court**

As stated in the Petition, Petitioner asks this Court to determine whether an expert must conduct his or her own testing of a vehicle before determining whether the product is crashworthy. Although this issue is superficially enticing, the fact is that neither the Third Circuit Court of Appeals nor the District Court so held; in fact, neither Court considered the issue at all. The District Court observed and opined:

> As Noettl's statements demonstrate, he did no testing of any evidence. He identified no specific treatises, articles, or written authorities on any issue. He performed no calculations. He used no models or computer simulations. Instead, to form his opinion, he relied on his experience and training. His curriculum vitae shows considerable experience and training in the area about which he seeks to testify, Doc.

> No. 84 Exhibit I, and defendants do not challenge his qualifications. The issue is whether Oddi has sufficient evidence that Noettl brought those qualifications to bear on the particular problems of the case.
>
> We find that he has not. We need not measure his adherence to any of the Daubert-related factors identified by the Third Circuit because he satisfied none of them. He has not rendered an opinion like the one found in Kuhmo, where there was at least a particular methodology about the tire failure to examine. Reduced to its essence, Noettl's theory is that the bumper and floor should have been made stronger, by using thicker metal or reinforcement. The absence of reviewable study, measurement, calculation, or reference accompanying these conclusions is sufficient to render them unreliable. He has not supplied us with the bases for his broad conclusions, and thus we are left with no means to test them.

Appendix, 103a-104a. It is obvious, then, that the District Court was prepared to consider treatises, articles, written authorities, calculations, models and computer simulations in its determination of whether Mr. Noettl's opinion was substantiated. It is equally obvious that the Court was willing to consider *any* scientific basis for those opinions; however, the Court simply was unable to find any even though Mr. Noettl had been put to the task of producing any basis that there was. Thus, the District Court properly exercised its discretion and dismissed the case.

The Court of Appeals agreed:

> Although Daubert does not require a paradigm of scientific inquiry as a condition precedent to admitting expert testimony, it does require more than the haphazard, intuitive inquiry that Noettl engaged in. Given Noettl's responses, Oddi could not establish the *existence* of Noettl's methodology and research let alone the *adequacy* of it. (footnote omitted).
>
> . . .
>
> Not only did Noettl not test his hypothesis, he did not even attempt to calculate the force that was inflicted on the truck by the guardrail at impact; he did not calculate the force of the bridge abutment on the truck; and he did not measure the strength of the guardrail or determine how much force the guardrail could sustain. He did not know how much was required to bend the bumper or penetrate the floor, or how much force the bumper or floor could withstand. His hypothesis about adding a "wedge" or bracket to [the] bumper was likewise without support as he did not determine the tensile strength or gauge of whatever metal should be incorporated into his alternative design. Accordingly, there was no way of knowing if his suggested alternative would better protect the cab's occupant, or if the suggested modifications were practical.
>
> Essentially, Noettl's expert opinion that the front bumper would have sustained the impact with the guardrail and not ramped had it been strengthened with either bracketry or wedge supports and that the flooring in the occupant compartment should have been thicker or

> ribbed is based on nothing more than his training and years of experience as an engineer. Although there may be some circumstances where one's training and experience will provide an adequate foundation to admit an opinion and furnish the necessary reliability to allow a jury to consider it, this is not such case. *See e.g.*, Lauria, at 599 (former Conrail foreman's many years of experience with railroad track equipment, maintenance and safety equipment, qualified him as an expert to testify about Amtrak's responsibility to inspect and maintain railroad track in a safe condition). Noettl's *ipse dixit* does not withstand Daubert's scrutiny. An "expert's opinion must be based on the methods and procedures of science rather than on subjective belief or unsupported speculation." Paoli II, at 741 (citations and internal quotations omitted).

Appendix, 42a-43a; 47a-48a.

Thus, it can be seen that the issue Petitioner attempts to present to this Court – whether an expert "must conduct testing of the subject vehicle" to determine whether it is crashworthy – was not before or decided by the courts below.

### C. The Petition Fails To Address The Third Circuit Court's Alternative Ground For Affirmance And Therefore Seeks An Advisory Opinion

In addition to affirming the District Court's discretionary determination that Mr. Noettl's testimony was not sufficiently reliable to be admissible, the Third Circuit Court ruled in the alternative that Petitioner *also* failed to

satisfy the third and fourth elements of a crashworthiness claim in that Mr. Kazarian's testimony utterly failed to establish what injuries would have resulted absent the alleged design defect:

> We also note an obvious gap in Oddi's argument. As recited earlier, Oddi retained two experts, Noettl and Kazarian. The district court also found that Kazarian's expert opinion testimony did not satisfy Daubert. 3/31/99 Dist. Ct. Op. at 15-16. Kazarian's expert opinion went to the "enhanced injuries" element of the crashworthiness claims. Unless Oddi can establish that the defendants' design and/or manufacture enhanced injuries he would not have otherwise sustained, or caused him to sustain injuries that he would not have sustained otherwise, there can be no recovery under a theory of crashworthiness. Carrasquilla, 963 F.Supp. at 458. Consequently, even assuming *arguendo*, that Oddi convinced us that Noettl's testimony was improperly excluded, his failure to address the admissibility of Kazarian's testimony means that Oddi has no admissible evidence to demonstrate the "enhanced injuries" elements of a crashworthiness claim.
>
> . . .
>
> Moreover, Kazarian's testimony would not have been as helpful as Oddi believes even if it had been admitted. Kazarian conceded that he had no opinion of what injuries Oddi would have suffered had there been no compromise to the floor of the occupant compartment and had no opinion on what injuries Oddi would have sustained if the truck had not ramped the guard rail.

Appendix, 48a-49a.

The Third Circuit Court of Appeals ruled that Petitioner's case was fatally deficient on two unrelated grounds. Petitioner attempts to challenge only the first of alternative grounds for affirmance. Therefore, any opinion this Court might render with respect to the challenged ground would be a mere advisory opinion that could have no effect on the outcome of the case; the second ground for affirmance would remain. Again, the pending Petition would not warrant review by this Honorable Court.

### D. The Petition Seeks To Challenge A Supported Discretionary Determination

Although discretionary determinations are not immune from appellate review, they obviously provide an extremely limited opportunity for this Court to provide important guidance to the bench, the members of the bar and the nation's citizens. This observation is inherent in that part of Rule 10 that observes that this Court will rarely entertain challenges to the manner in which the correct law is alleged to have been applied to a given case. Further, this observation is particularly true where, as here, the determination is well-supported by the record.

#### 1. The Decision From Which Petitioner Would Appeal Is A Discretionary Determination

Petitioner contends that the testimony of his "expert" was improperly excluded. As recently as Kumho Tire Co.

v. Carmichael, 526 U.S. 137 (1999), this Court emphasized the broad discretion accorded a district court in determining *how* to test the "expert's" opinions and whether to eventually admit those opinions:

> The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's relevant testimony is reliable. Our opinion in Joiner makes clear that a court of appeals is to apply an abuse-of-discretion standard when it "review[s] a trial court's decision to admit or exclude expert testimony." 522 U.S. at 138-139. That standard applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed both to avoid unnecessary "reliability" proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.

Kumho Tire, 526 U.S. at 152-53 (emphasis original).

### 2. The Decision From Which Petitioner Would Appeal Is Supported

Here, as set forth above, the District Court was unimpressed with the "basis" offered by Mr. Noettl in support of his opinion that the bumper and floorboards could feasibly have been strengthened to protect Oddi from the

injuries suffered in this accident. That decision was not only supported but compelled. Mr. Noettl himself testified under oath he had not tested his theories but that someone should. Mr. Noettl admits that he has conducted no tests, has no alternative design, and has no idea what would happen in the event the truck had been somehow strengthened in the manners he vaguely suggests. Rather, he argues that "someone" should determine whether his theories really work. *See* Appendix 23a-27a; 43a-46a; 79a-82a.

The Court reached a discretionary determination that such testimony is not acceptably reliable. Petitioner does not allege that any information was improperly considered by the District Court nor that any information that should have been considered was refused by that Court. Petitioner simply argues that he would have placed more emphasis on some considerations, and less on others, than did the District Court. The instant matter, then, is a classic example of the type of supported discretionary determination for which further review would provide no general benefit to the nation, even had the determination been incorrect.

## E. The Merits Of The Petition

### 1. Introduction

This Respondent believes that a petition for a writ of certiorari is not a proper vehicle to argue the *merits* of Petitioner's position on the issue; rather, the Petition should address the importance of the resolution of the issue presented, including if possible an indication that

the issue is not presently the subject of agreement amongst the various courts of the nation.

Here, however, the Petition is addressed almost entirely to Petitioner's position on the issue, *i.e.*, the merits. In brief response, then, Respondent contends, for the reasons that follow, that the determination from which Petitioner would appeal is correct.

### 2. Petitioner's Experts' Was Unable To Address The Elements And Corollaries Of A Crashworthiness Test

Oddi's entire case is premised on the argument that running a vehicle into a guardrail at highway speed is foreseeable, and that any vehicle that allows an injury to occur in such an accident must therefore be defective. He requests that this Court allow his expert to set forth such a claim, notwithstanding the fact that he has consistently failed to address the requirement of Pennsylvania law that one who complains of the crashworthiness of a vehicle must establish certain elements, as well as corollaries to the elements, of the cause of action. However, Oddi's experts readily admit they are unprepared to address these issues. For example, one of the "remedies" suggested by Mr. Noettl was the use of a bracket to strengthen the front bumper. However, when asked about that, he had no idea how that should be constructed to provide greater safety to the occupants:

> Q. What if you used a brace? What type of metal should that brace be constructed from?
>
> A. Again, you could use the same as the bumper. Again, you would have a lot of

choices on that. The bracketry would probably not be as strong as the wedge. Probably not. Test it and maybe you would achieve a strength that would far exceed anything you could expect.

Q. What would the tensile strength or the gauge of the metal have to be on both of those options?

A. The way you go through that is look up in books and you say, "Here. We got some metal here and let's try this." Certain gauge, certain strength, something that is readily available. It's not a big thing, is what I'm trying to say . . .

Q. So this would be something relatively simple to look up in a book, and you could determine from the computations in some engineering book what you should be using. What would the name of the book be?

A. Any machine design book.

Q. Is that a particular book or is that a type of a book, machine design book?

A. That's a type of book.

Q. Could you give me an authority?

A. There are machine design books that give you all types of metal gauges. If you go through the design process for any of these things on a bumper, frame rails, exactly what they do – they don't sit down. They don't do finite element analysis. They look up in books what metal thickness, what's

our yield strength, what's our tensile properties of this metal, bang, bang, bang. We're going to use this.

Q. Have you done that?

A. No. I haven't done that, no.

Q. So you don't know what the thickness would have to be, what the metal gauge, what the tensile strength –

A. Right.

Q. – what type of material you would need to use; is that correct?

A. I told you, I would use – probably start with the same material that you have in the bumper. Take a piece of metal, turn it on its edge, put it in back of it, weld it on there for a test, see what strength you do gain out of this as far as impact, as far as bending moments and as far as shearing. You sure hope it won't sheer off. You would do that. You would say, "I want it a little bit stronger." The easiest way, by far, is to thicken the metal. That's all you have to do. Get a lower gauge metal and put that on there and try it again.

Appendix, 25a-27a. Mr. Noettl was similarly unable to explain how he determined that thickening or ribbing of the floorboards might provide a feasible alternative that would have mattered in this case.

Q. What was wrong with [the floor]?

A. It wasn't strong enough to prevent intrusion in this type of an accident into the occupant compartment, exposing the driver to the dangers of that intrusion.

Q. What should have been done?

A. The metal could have been made thicker. It could have been ribbed.

Q. How thick should it have been?

A. Well, the way I would do that is to thicken the metal and rib it and then do a test to see if, under these types of foreseeable accidents it would really retain the integrity of the occupant compartment.

Appendix, 102a.

Thus, it can be seen that Mr. Noettl has no idea whether this strategy would yield a feasible alternative design that would have aided Oddi in the instant accident.

Finally, in Barker v. Deere and Co., 60 F.3d 158 (3rd Cir. 1995), the Court noted that a proposed design change is not necessarily an improvement if such change would increase other relevant risks. There, the Court considered a claim that a tractor had not been crashworthy because the tractor's operator protection system ("OPS") did not sufficiently protect against intrusion by logs, and the Court held that, to prevail under Pennsylvania law, the plaintiff would have to show, not just that an OPS design existed that would have prevented the plaintiff's injuries from log penetration, but also that such a design would "pose no additional risk to the operator." Barker, 60 F.3d at 163-64, *citing* Habecker v. Clark, 36 F.3d 278, 284-86 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 1313 (1995). The District Court addressed this concern as well in determining that Mr. Noettl's testimony was insufficient to make out a case:

> Other elements of this particular case confirm our conclusions. If the alleged defect involved something like exposed gears or blades on an industrial machine, the proposed alternative could take the form of a cover or guard. In most conceivable cases the composition of the cover – heavy plastic, wire mesh, sheet metal – would matter little, so long as it was sturdy. The machine in this case, however, is heavy, mobile, long-lasting, and carries humans. These machines frequently collide. A lay person's understanding of physics reveals that if car components are made too rigid, the forces of collisions would not be absorbed by the vehicle, but rather will be transmitted to the occupants, or the occupants of another vehicle. Good vehicle design thus must occupy a range between parts that are too soft and too rigid. The summary judgment record gives no indication that Noettl's opinions accounted for such issues to any appreciable extent.

Appendix, 104a-05a.

For these reasons, the District Court was correct, and the Court of Appeals for the Third Circuit correctly affirmed that determination as a proper exercise of discretion.

### 3. Response To Petitioner's Position

Petitioner advances an overly-simplistic argument built upon numerous fatal flaws. Brought to its essence, Petitioner contends that any vehicle that allows its occupants to be injured in such accidents is *per se* defective because impacts with guardrails at highway speed are

foreseeable. He claims that the "dangerous" instrumentality must have been the truck because it is "uncontested" that the guardrail did not "fail." The obvious flaw in this rationale is the presumption that any device capable of causing injury must be defective. There simply is no support for such a position in Pennsylvania law. To establish a crashworthiness case, Pennsylvania law requires that a plaintiff propose a better way of building the vehicle *and show that that design is feasible and would have made a difference*. Kupetz v. Deere & Co., Inc., 435 Pa.Super. 16, 644 A.2d 1213 (1994), *appeal denied*, 539 Pa. 693, 653 A.2d 1232 (1994). Petitioner has consistently failed to meet these burdens.

There is, however, a more subtle flaw in Petitioner's simplistic approach. Petitioner further claims that, because the guardrail did not collapse on impact, it would have deflected the truck back onto the roadway had the truck only been equipped with a stronger bumper. This entirely untested theory presupposes that the guardrail would have withstood a direct impact from a truck equipped with the battering ram front end as advocated by Mr. Noettl. There is simply no basis in the record to believe that this is true.

## III. Conclusion

For the forgoing reasons, Appellees Grumman Allied Industries, Inc., Grumman Olson Bodies, Inc., and Olson Bodies, Inc., respectfully request that the pending Petition For Writ Of Certiorari be denied.

Respectfully submitted,

GORR, MOSER, DELL & LOUGHNEY

JOHN H. WILLIAMS, JR., ESQUIRE
DONALD J. MCCORMICK, ESQUIRE
437 Grant Street
1300 Frick Building
Pittsburgh, PA 15219
(412) 471-1180

Attorneys for Respondents
Grumman Allied Industries, Inc.;
Grumman Olson Bodies, Inc.; and
Olson Bodies, Inc.